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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, RECEIVER,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ERNEST B. HAIRE, III, *Pro Se*
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January 22, 2005

QUESTIONS PRESENTED

1. Whether the Due Process Clause's requirements of "minimum contacts" with a forum state, and "fair play and substantial justice" are inapplicable when a court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process.

2. Whether it unnecessary for a party to satisfy the venue statutes when a district court has ancillary subject matter jurisdiction with regard to that claim.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. However, the Respondent, Ms. Meshulam, is a receiver appointed to collect a disgorgement judgment against Paul A. Bilzerian for the Securities and Exchange Commission. Ms. Meshulam is referred to as "Meshulam" or the "Receiver" throughout. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Ernest B. Haire, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") denying rehearing is reprinted in the Appendix at A-1. The opinion of the DC Circuit is reported at 378 F.3d 1100, and is reprinted in the Appendix at A-2. The unreported opinion of the District Court for the District of Columbia is reprinted in the Appendix at A-3.

JURISDICTION

The judgment of the DC Circuit was entered on August 13, 2004. A timely motion for rehearing was denied on October 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant constitutional and statutory provisions are the Fifth Amendment to the United States Constitution and 28 U.S.C. §§ 754, 1692, which are reprinted in the appendix at A-4.

STATEMENT OF THE CASE

This is a breach of contract action on a $1 million promissory note ("Note") secured by a Stock

Pledge Agreement that consisted of publicly traded stock and bonds of Cimetrix with an original market value of $2.3 million ("Pledge Agreement"). The Note and Pledge Agreement were signed by Haire in Tampa, Florida on July 12, 2000, in favor of Overseas Holdings Limited Partnership ("OHLP"), a partnership controlled by Terri Steffen, the wife of Paul Bilzerian. The Note contained a choice of law provision that provided the Note was governed by Florida law, and a forum-selection clause that stated, "Venue for any legal proceeding arising under this Note or the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida."

Haire was persuaded by OHLP to borrow the $1 million rather than dispose of his stock and bonds in the public market because OHLP wanted to protect the price of the 4 million shares of stock that it owned in the same public company. Prior to signing the Note and Pledge Agreement, OHLP represented, falsely as it turned out, that the $1 million of cash being used for the loan was free from claims of any creditor of OHLP, Steffen or Bilzerian. OHLP also promised that it would permit Haire to sell any or all of the pledged securities at any time to pay the Note in part or in full.

From April 10, 2001, until sometime after June 1, 2001, as the market price of the Cimetrix shares fell, Haire made several requests to OHLP for permission to sell the pledged securities to pay the Note. Permission was never granted and the value of the pledged securities decreased by nearly $2 million, twice the amount of the Note.

On May 29, 2001, OHLP and Steffen filed for bankruptcy. In December 2001, when Steffen and OHLP entered into a settlement agreement with the SEC and the Receiver, Haire learned that the representations made by OHLP were false and that it knew or should have known they were false.

On January 16, 2002, the DC Court approved an assignment of the Note and Pledge Agreement by OHLP to Meshulam. The assignment provides that OHLP shall be entitled to 30% of the proceeds from the Note. OHLP also agreed to dismiss its bankruptcy case.

On May 9, 2002, shortly after OHLP dismissed its bankruptcy case, in accordance with the Note's mandatory forum-selection clause, Haire sued OHLP in state court in Florida for breach of contract, negligent misrepresentation, and fraudulent misrepresentation with respect to the Note and Pledge Agreement ("Florida Action"). The complaint in the Florida Action seeks all remedies available at law or equity, including rescission and damages. Haire was prohibited from naming the Receiver by the DC Court order that appointed her. However, Haire invited the Receiver to intervene, but she declined.

On June 19, 2002, ignoring the forum selection clause, Meshulam sued Haire in the DC Court for failing to pay the Note. On September 25, 2002, Haire waived service of the summons. On November 4, 2002, prior to the date Haire's answer was due, Meshulam filed a motion for summary judgment. On November 18, 2002, Haire filed a Motion to Dismiss for, among

other things, lack of personal jurisdiction, improper venue, and failing to name OHLP as an indispensable party ("Motion to Dismiss").

On January 17, 2003, the DC Court denied Haire's Motion to Dismiss on the grounds that it had personal jurisdiction over him pursuant to 28 U.S.C. § 1692, which the court held allowed nationwide service of process. With respect to venue, the district court found that venue was proper in the District of Columbia for any action that related to the receivership estate and that the forum-selection clause did not apply because the law required venue in the District of Columbia. The DC Court also found that OHLP was not an indispensable party.

On July 17, 2003, the district court granted Meshulam's motion for summary judgment. On appeal, the DC Circuit affirmed in a published opinion.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve a Conflict among Ten Circuit Courts with Respect to Whether a Statute That Provides for Nationwide Service Is Subject to the "Minimum Contacts" and "Fair Play and Substantial Justice" Due Process Requirements.[1]

The DC Circuit held that the Due Process Clause's requirements that a defendant have some "minimum contacts" with a forum state or federal district, and that a court's exercise of personal jurisdiction be consistent with "fair play and substantial justice" are inapplicable when a federal statute authorizes nationwide service. *Opinion* at 11, fn.8. If a defendant is served with the complaint within the United States, the Due Process Clause is automatically satisfied. The DC Circuit's decision is in accord with a majority of circuit courts. See Driver v. Helms, 577 F.2d 147, 157 (1st Cir.1978); Trans-Asiatic v. Apex Oil Company, 743 F.2d 956, 959 (1st Cir.1984); Mariash v. Morrill, 496 F.2d 1138, 1143 (2nd Cir.1974); Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1257-58 (5th Cir.1994); Bellaire General Hospital v. Blue Cross Blue Shield, 97 F.3d 822, 825-826 (5th Cir.1996); Haile v. Henderson, 657 F.2d 816, 824-826 (6th Cir.1981); NGS American, Inc. v.

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[1]Petitioner has not separately raised the following issue because it is fairly included: whether 28 U.S.C. § 1692 authorizes a district court to obtain *in personam* jurisdiction over a defendant served in a district outside its territorial boundaries. *See Opinion* at 4-11.

Jefferson, 218 F.3d 519, 524 fn.5 (6th Cir.2000); Medical Mutual of Ohio v. deSoto, 245 F.3d 561, 566-568 (6th Cir.2001); Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1035-1036 (7th Cir.2000); In re Federal Fountain, Inc., 165 F.3d 600 (8th Cir.1999) (en banc); Action Embroidery Corporation v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1178-1180 (9th Cir.2004).

Two circuit courts have disagreed, holding that due process requires something more than service of the complaint within the United States. See Peay v. Bellsouth Medical Assistance Plan, 205 F.3d 1206, 1211-12 (10th Cir.2000); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 947 (11th Cir.1997)("A defendant's 'minimum contacts' with the United States do not . . . automatically satisfy the due process requirements of the Fifth Amendment.").

The Third Circuit addressed the issue and assumed, without deciding, that due process requires more than the mere service of a complaint somewhere within the United States. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 370-71 fn.2 (3rd Cir.2002). The Fourth Circuit addressed the issue and, after quoting and citing the Eleventh Circuit's decision in Republic of Panama, concluded that "when a defendant is located within the United States, he must look primarily to federal venue requirements for protection from onerous litigation." ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626-627 (4th Cir.1997).[2]

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[2]In a more recent case, the Fourth Circuit decided a case involving a federal receiver and commented that the district

The disagreement over this issue is even greater than the circuit split indicates. Several circuit courts in the majority have had strong dissents. In Busch v. Buchman, the majority adopted the "national contacts" test but Judge Garza stated in dissent:

> [The] fundamental differences between subject matter and personal jurisdiction undermine the majority's Due Process analysis. . . . I disagree . . . with the majority's conclusion that "sovereignty may remain germane in determining personal jurisdiction because it defines the scope of the due process analysis." Personal jurisdiction represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Because the personal jurisdiction requirement is a function of the individual liberty interest, the proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating in a distant or inconvenient forum. Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect that interest.

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court's *in rem* jurisdiction over property of a receivership does not equate to personal jurisdiction over persons in other districts. Gilchrist v. General Electric Capital Corporation, 262 F.3d 295, 301 (4th Cir.2001).

Busch, 11 F.3d at 1259 (Garza, J., dissenting) (citations and quotations omitted).

Shortly after Busch was decided, another panel of the Fifth Circuit addressed the issue in Bellaire Gen. Hosp. and expressed "grave misgivings regarding the authority upon which we rely." The court stated:

> Although we dutifully apply Busch, we emphasize our disagreement with it to the extent it concludes that the proper personal jurisdiction test in a national service of process case is whether minimum contacts exist between the individual and the national sovereign. We view personal jurisdiction and service of process as conceptually distinct issues. We fail to apprehend how personal jurisdiction can be separated from due process by Congressional enactment of nationwide service of process provisions. *See id.* at 1259 (Garza, J., dissenting); see also Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F.Supp. 1102, 1106 (S.D.Ga.1994) ("To allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary is nonsensical. . . . To say that due process has no place in a personal jurisdiction inquiry seems contrary to the whole concept of due process."). It is far from clear to us that Blue Cross, a corporation operating exclusively within

> the State of Michigan, had sufficient contacts with the State of Texas to permit the district court to exercise personal jurisdiction over it under the traditional personal jurisdiction analysis, i.e., whether the defendant has had minimum contacts with the forum and whether maintenance of the action in the forum will offend traditional notions of fair play and substantial justice. See International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Thus, though we follow Busch today and find that the district court properly exercised personal jurisdiction over Blue Cross in this case, we do so with grave misgivings regarding the authority upon which we rely.

Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d at 826 (citations and quotations omitted).

The Sixth Circuit decided Haile v. Henderson Nat'l Bank over a strong dissent by Judge Keith, who wrote:

> The majority opinion holds that Congress may require a citizen to submit to the jurisdiction of any one of the 95 federal district courts in this country without regard to whether the citizen has had previous contact with a particular jurisdiction. . . . The court. in refusing to apply a "minimum contacts" analysis to the facts of this case, attempts to

distinguish the Supreme Court's decision in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The majority first states that the "minimum contacts" test was not originally intended to restrict a federal court's exercise of jurisdiction over persons residing within the territorial boundaries of the United States. It then concludes that International Shoe's analysis must be limited to questions involving a state's power to compel the appearance of non-resident defendants before courts within the borders of the state. However, more recent developments in the law recognize that an analysis similar to that used in International Shoe must also be applied in federal question cases. Black v. Acme Markets, Inc., 564 F.2d 681, 686 n.8 (5th Cir. 1977); Lone Star Package Car Co. v. Baltimore and Ohio R. Co., 212 F.2d 147, 155 (5th Cir. 1954); Fraley v. Chesapeake and Ohio Ry., 397 F.2d 1, 3 (3d Cir. 1968); Oxford First Corporation v. PNC Liquidating Corp., 372 F.Supp. 559 (S.D.Iowa 1973). See also Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); United States v. Scophony Corp., 333 U.S. 795, 804 n.13, 68 S.Ct. 855, 860 n.13, 92 L.Ed. 1091 (1948). But see First Flight Company v. National Car Loading Corporation, 209 F.Supp. 730, 736 (E.D.Tenn.1962). The

due process clause of the Fifth Amendment protects citizens from the arbitrary exercise of *in personam* jurisdiction by federal courts just as the due process clause of the Fourteenth Amendment protects citizens from such action by state courts. The majority acknowledges the applicability of the Fifth Amendment's due process clause here. However, the court states that in the federal question cases, the only due process restriction on the exercise of in personam jurisdiction by federal district courts over persons residing within the United States is the notice requirement of Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny. The Mullane test, which requires "notice reasonably calculated ... to apprise interested parties of the pendency of the action," id. at 314, 70 S.Ct. at 657, defined the right protected by the Fifth Amendment's due process clause as the "fundamental right ... to be heard." Id.

It is my belief that the majority mistakes Mullane's requirement of reasonable notice as the constitutional right at issue in that case; when in fact, reasonable notice is only one means adopted by the Court to ensure that the individual's fundamental right to be heard is not abridged. Common sense

> dictates that a court cannot numbly apply Mullane's notice requirement as if notice alone assures due process. Moreover, since the decision in International Shoe, the Supreme Court has recognized that there may be other due process limitations on a federal court's exercise of in personam jurisdiction.

Haile v. Henderson, 657 F.2d at 826-29 (Keith, J., dissenting).[3]

The Eighth Circuit has issued conflicting decisions. In South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40, 44 n.10 (8th Cir.1989), the court held that due process requires "in every case" that there be minimum contacts between a defendant and the state in which he or she is expected to answer before the court that issued the process may constitutionally assume personal jurisdiction over that defendant. However, in In re Federal Fountain, Inc., the Eighth Circuit, sitting *en banc*, overruled Kansas City Southern.

In rejecting the "national contacts" test, the Tenth Circuit explained:

> [T]he personal jurisdiction requirement flows from the Due Process Clause of the Fifth Amendment and restricts judicial power in order to protect

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[3]A recent panel of the Sixth Circuit appears less than enthusiastic over the court's holding in Haile. See NGS American, Inc., 218 F.3d at 524 fn.5.

the individual's liberty interest. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). Thus, the "proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating" in an unfair or unreasonable forum. Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1259 (5th Cir.1994) (Garza, J., dissenting). "Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this interest." Id. (Garza, J., dissenting); see also Willingway Hosp., Inc. v. Blue Cross & Blue Shield, 870 F.Supp. 1102, 1106 (S.D.Ga.1994) ("To allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary[,] is nonsensical."). The Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. However, the Court has held that due process under the Fourteenth Amendment requires that "maintenance of [a] suit ... not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted). Due process limits on a court's ability to exercise jurisdiction "are

designed to protect [defendants] by providing them with fair notice that their activities will render them liable to suit in a particular forum." Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 945 (11th Cir.1997) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 470-77 (1985)). A defendant is deemed to have "fair warning" if it has "purposefully directed [its] activities at residents of the forum." Burger King Corp., 471 U.S. at 472 (internal quotation marks and citation omitted). However, even if a defendant has "minimum contacts" with the forum, due process is not satisfied unless "the assertion of personal jurisdiction would comport with fair play and substantial justice." Id. at 476 (internal quotation marks and citation omitted).

Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements "should be discarded completely when jurisdiction is asserted under a federal statute." Republic of Panama, 119 F.3d at 945. The Due Process Clauses of the Fourteenth and Fifth Amendments are virtually identical, and both "were designed to protect individual liberties from the same types of government infringement." Id. (citing Mathews v.

> Eldridge, 424 U.S. 319, 331-32 (1976)). Accordingly, we hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment "protects individual litigants against the burdens of litigation in an unduly inconvenient forum." Id.

Peay v. Bellsouth Medical Assistance Plan, 205 F.3d at 1211-12.

Several courts have noted the conflict amongst the circuit courts and have observed that the Supreme Court has yet to address this issue. See NGS American, 218 F.3d at 524 fn.5 ("The Supreme Court has never squarely decided whether the Fifth Amendment due process is satisfied merely by national contact under a nationwide service of process provision."); Medical Mutual of Ohio, 245 F.3d at568 fn.4 ("Our conclusion is not universally adopted among the circuits . . . The Tenth and Eleventh Circuits . . . have recently rejected this view"); Sheet Metal Workers' National Pension Fund, 212 F.3d at 1036 ("the tenth circuit has concluded that the defendant must have adequate contacts with the federal district in which the litigation will occur, and not just with the United States as a whole"). As this Court has explained, the Due Process Clause exists, in part, to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where

that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This Court should resolve the conflict between the circuit courts over this important due process issue and return this important element of predictability to the federal legal system.[4]

[4]If the Court grants this Petition, Haire will either accept counsel that the Court appoints to represent him, or he will hire qualified counsel to complete the briefs and present oral argument on his behalf.

II. The Court Should Determine Whether it Is Unnecessary to Satisfy the Venue Statutes When a District Court Has Ancillary Subject Matter Jurisdiction over a Claim.[5]

It is undisputed that the complaint in this case does not satisfy the requirements of any venue statute. It is also undisputed that the complaint does not seek to resolve any dispute over the ownership or possession of receivership property. Nonetheless, the DC Circuit, relying on the Sixth Circuit's decision in Haile v. Henderson, held that when a district court has ancillary subject matter jurisdiction over a claim or a party, it is unnecessary to satisfy the venue statutes. *Opinion* at 12.[6]

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[5]Petitioner has not separately raised the following issue because it is fairly included: Whether a valid forum selection clause in a contract automatically becomes unenforceable whenever one of the parties to the contract assigns his rights to a federal receiver. The DC Circuit held that the forum selection clause in the contract should be disregarded because the law *requires* venue in the District of Columbia for any action brought by the receiver. *Opinion* at 12-13. However, any determination that ancillary venue is proper in the District of Columbia is by no means a *requirement* that venue must be in the District of Columbia. Section 754 plainly states that a receiver "shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title." 28 U.S.C. § 754.

[6]Section 754, which addresses *in rem* subject matter jurisdiction, specifically authorizes suits in districts other than that of the appointing court. Section 1692 only addresses service of process and not venue. If Congress had wanted to provide venue in the appointing court for *all actions brought by a receiver*, it could easily have done so but it did not.

This Court has stated, "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." Olberding, Doing Business as Vess Transfer v. Illinois Central Railroad, 346 U.S. 338, 340 (1953). Contrary to this Court's instruction, the DC Circuit's decision improperly blends three distinct inquiries concerning subject matter jurisdiction, personal jurisdiction, and venue.[7]

Other circuit courts have correctly noted that "[v]enue is distinct from jurisdiction. Venue may be proper or improper, independent of questions of subject matter or personal jurisdiction." Driscoll v. New Orleans Steamboat Company, 633 F.2d 1158, 1159 fn. 1 (5th Cir.1981); also see Farmers Elevator Mutual Insurance v. Carl J. Austad & Sons, 343 F.2d 7, 11 (8th Cir.1965) ("jurisdiction of the subject matter . . . is not equivalent in meaning to Venue. . . . The terms 'jurisdiction' and 'venue' should not be confused. . . . Because of [their] fundamental differences, the tests to be applied in determining whether there is jurisdiction of the subject matter do not necessarily control the resolution of venue questions.")(citations and quotations omitted).

This Court should resolve whether a party can avoid complying with the venue statutes when the district court determines it has ancillary subject matter jurisdiction over its claim.

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[7]A court appointing a receiver will invariably have subject matter jurisdiction over disputes involving receivership property.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Ernest B. Haire, III
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Petitioner

Dated: January 22, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 2004 Decided August 13, 2004

No. 03-5237

SECURITIES AND EXCHANGE COMMISSION,
AND
DEBORAH R. MESHULAM,
APPELLEES

v.

PAUL A. BILZERIAN
APPELLEE

v.

ERNEST B. HAIRE, III,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01221)

S. Scott Morrison argued the cause for appellant. On the briefs was *G. Michael Nelson.*

Charles B. Wayne argued the cause for appellee Deborah R. Meshulam. On the brief was *Deborah J. Israel.*

Before: SENTELLE, ROGERS, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This case is ancillary to a long-standing Securities and Exchange Commission (SEC) enforcement proceeding against Paul A. Bilzerian for violation of federal securities laws. The United States District Court for the District of Columbia created a receivership estate and appointed a receiver to satisfy the SEC's judgment against Bilzerian's assets. In the instant action, the receiver filed a complaint against defendant Ernest B. Haire, III, to collect on the principal, interest, and fees due and owing to the receivership estate on a $1 million loan. Haire moved to dismiss the complaint, alleging that the court lacked personal jurisdiction over him, that venue in the District of Columbia was improper, that the forum was not convenient, and that the receiver had failed to join a necessary party. The district court rejected those challenges, and entered summary judgment in the receiver's favor. We affirm.

I

In 1993, the United States District Court for the District of Columbia ordered Bilzerian to disgorge over $33 million in profits and $29 million in prejudgment interest obtained from his unlawful transactions in several common stocks. *SEC v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994). On December 22, 2000, after finding Bilzerian in

contempt for failing to pay the 1993 disgorgement judgment, the district court appointed the appellee, Deborah Meshulam, as receiver "for the purpose of identifying, marshaling, receiving and liquidating [Bilzerian's] assets." *SEC v. Bilzerian*, 127 F. Supp. 2d 232, 232 (D.D.C. 2000), *aff'd*, 2003 WL 22176183 (D.C.Cir.2003)(hereinafter Receivership Order). The Receivership Order authorized the receiver to "take and maintain complete and exclusive control, possession and custody of Bilzerian's assets wherever situated" and to "liquidate any interest in any asset held by anyone on behalf of Bilzerian, including but not limited to the initiation and prosecution of litigation against others to recover such asset and/or interests in asset on behalf of the Receivership Estate." *Id.* at 233. The receiver filed copies of the Receivership Order in various federal district courts, including the United States District Court for the Middle District of Florida where Haire resides.

The assets of the receivership estate included, inter alia, the assets of Overseas Holdings Limited Partnership (OHLP), a partnership owned by the Bilzerian family to which Bilzerian transferred substantial assets during the course of the SEC litigation. On July 12, 2000, during the pendency of the contempt proceeding against Bilzerian, OHLP loaned Haire $1 million. The loan was reflected in a promissory note (the "Note"), which accrued interest at an annual rate of 12% and made the principal payable on demand. The Note was secured by Haire's pledge of his stock shares in Cimetrix, Inc. OHLP demanded payment on August 23, 2000, and Haire's failure to pay within 15 days of that demand triggered the Note's

terms governing default and penalties. Haire and OHLP subsequently executed a Forbearance and Extension Agreement on March 1, 2001, under which Haire agreed to pay accrued interest immediately, and OHLP agreed to extend the due date for payment of principal until March 1, 2003.

In December 2001, OHLP agreed to "transfer to the Receiver all right, title and interest in that certain note and stock pledge agreement and related documents by Ernest Haire III in the principal amount of $1 million, as extended." Consent and Undertakings Agreement at 5 (J.A. 87); *see also* Assignment Without Recourse (J.A. 100). Haire, in his capacity as trustee of another Bilzerian-related entity, signed the agreement. On January 16, 2002, the court entered the agreement as a consent judgment. On April 19, 2002, the receiver sent a letter to Haire demanding that he immediately pay all accrued and unpaid interest due on the Note, and warning that failure to pay within fifteen days would result in a default under the Note's express terms. Haire failed to pay, and the receiver notified him that the entire $1 million principal (and accumulated interest and penalty fees) was immediately due.

On June 19, 2002, the receiver filed the present complaint against Haire, demanding judgment for the full amount of principal and accrued interest under the Note. Haire filed a motion to dismiss the complaint on the grounds of lack of personal jurisdiction, improper venue, forum non conveniens, and failure to name an indispensable party. At the same time, the receiver moved for summary judgment. The district court

denied Haire's motion to dismiss, Mem. & Order (D.D.C. Jan. 17, 2003) (hereinafter Jan. 2003 Mem. Op.), and granted the receiver's motion for summary judgment, Mem. & Order (D.D.C. July 17, 2003) (hereinafter July 2003 Mem. Op.).

Haire now appeals.[1] We review both of the district court's orders de novo. *See Gormon v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002); *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001). In Part II, we consider Haire's challenge to the court's conclusion that it had personal jurisdiction. In Part III, we consider Haire's remaining objections to the court's order denying dismissal, as well as his objections to the court's grant of summary judgment to the receiver.

II

We begin with the threshold question of whether the United States District Court for the District of Columbia has personal jurisdiction over the defendant, a Tampa, Florida resident who claims not to have any

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[1]Haire also appeals the district judge's 2002 denial of his motion to recuse the judge from participation in Haire's case. *See* Mem. & Order (D.D.C. Dec. 4, 2002). Haire previously sought to overturn that denial by petitioning for a writ of mandamus. In denying the writ, a panel of this court readily held that the "district court did not abuse its discretion in deciding not to recuse." *In re: Ernest Haire*, 2003 WL 1873948, at *1 (D.C. Cir. 2003). That holding, premised not on the elevated standard of review for mandamus, but rather on the same standard that we would apply to the recusal question on appeal, is the law of the case.

contacts with the District of Columbia. In *SEC v. Vision Communications, Inc.*, a case also involving a receiver in a proceeding ancillary to an SEC enforcement action, we explained how such personal jurisdiction could be obtained. 74 F.3d 287, 290–91 (D.C. Cir. 1996). Step one involves Federal Rule of Civil Procedure 4(k)(1)(D), which provides that "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . when authorized by a statute of the United States." Fed.R.Civ.P. 4(k)(1)(D). Step two requires a statute that provides the "needed 'authorization' to have [the defendant] served" in a district "outside the territorial boundaries of the U.S. District Court for the District of Columbia." 74 F.3d at 290. Section 1692 of Title 28, we said, could provide such authorization. *Id.* That section states:

> In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district but orders affecting the property shall be entered of record in each of such districts.

28 U.S.C. § 1692. Finally, "to invoke § 1692, a receiver first must comply with 28 U.S.C. § 754." 74 F.3d at 290. Under that section, "a receiver appointed in one district may obtain jurisdiction over property located in another district by filing in the district court of that district, within ten days after the entry of his order of appointment, a copy of the complaint and his order of

appointment." *Id.*[2] Thus, we said, § 754 is "a stepping stone on [the court's] way to exercising *in personam* jurisdiction over" one who holds receivership assets in a remote district. *Id.* at 290.[3]

As precedent, *Vision Communications* relied on the Sixth Circuit's decision in *Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981), which is on all fours with the case presently before us. In *Haile*, a receiver was appointed in the Middle District of Tennessee for a bankrupt church and its assets. *Id.* at 818. The receiver then brought suit against an individual in the Northern District of Alabama who had defaulted on a note held by the church. *Id.* at 820. The Alabama defendant resisted on the ground that

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[2]Section 754 provides, in pertinent part:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.... Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to provide such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

[3]Further support for the proposition that § 754 is a "stepping stone" is the fact that, prior to 1948, the provisions of both sections were contained in a single predecessor statute, 28 U.S.C. § 117 (1940). *See* Reviser's Notes, H.R. REP. NO. 80–308, at 1807, 1869 (1947) (noting that § 117 was the basis for §§ 754 and 1692).

the district court in Tennessee lacked personal jurisdiction over him, and that court agreed, concluding that while they may provide the court with control of the property of the debtor, "neither 28 U.S.C. § 754 nor 28 U.S.C. § 1692 . . . grants this court personal jurisdiction of the defendants." *Id.* at 820.

The Sixth Circuit reversed. It held that, pursuant to § 754, "the territorial jurisdiction of the appointing court is extended to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754." *Id.* at 823. It noted that "Rule 4 of the Federal Rules of Civil Procedure contemplates the use of statutes of the United States which provide for service of process upon a party not . . . found within the state in which the district court is held." *Id.* at 824. And it concluded that the "statute of the United States which provides for service of process beyond the territorial limits of the state in which the district court sits in the case at bar is 28 U.S.C. § 1692." *Id.* "The process authorized by § 1692," the court said, "is not 'extra-territorial' but rather nationwide." *Id.* at 826. Under that section, "[t]he appointment court's process extends to any judicial district where receivership property is found." *Id.*

In *American Freedom Train Foundation v. Spurney*, the First Circuit pronounced itself in "agreement with the Sixth Circuit's holding that pursuant to sections 754 and 1692, '[t]he appointment court's process extends to any judicial district where receivership property is found.' " 747 F.2d 1069, 1073

(1st Cir. 1984) (quoting *Haile*, 657 F.2d at 826). And both circuits' discussions paralleled, and *Haile* expressly relied upon, the views of Professor Moore, who concluded: "[I]n cases under these two sections, the minimum contacts analysis of *International Shoe* as a limitation on extraterritorial power, does not apply, since service of process under § 1692 [is] nationwide." 7 (Pt. 2) JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 66.08[1] (2d ed. 1996).

In the present case, the district court followed the analysis outlined in *Vision Communications* and *Haile*. The court found that the receiver had complied with § 754 by filing the appropriate documents in the Middle District of Florida, and that this compliance meant that § 1692 authorized service of process. The court further found that Haire had been properly served. Citing Rule 4(k)(1)(D), the court concluded that it therefore had personal jurisdiction over the defendant. Jan. 2003 Mem. Op. at 5.

Haire does not dispute that the receiver filed the appropriate documents in Florida, or that he received service of process there. What he disputes is the district court's authority to issue process to obtain *in personam* jurisdiction over an out-of-state defendant. Section § 1692, Haire contends, authorizes extraterritorial service of process only to obtain *in rem* jurisdiction — jurisdiction over property — in another district, and not *in personam* jurisdiction over a defendant in such a district. When a court exercises only *in rem* jurisdiction,"the resulting judgment can affect only the property" and "cannot personally bind absentees simply on the basis of their interests in the

property." 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1070, at 281 (3d ed. 2002) (hereinafter WRIGHT & MILLER).

Haire's contention is, of course, inconsistent with the explanation of the role of § 1692 that we enunciated in *Vision Communications*. Haire contends that explanation was dicta because, in *Vision Communications*, the receiver had failed to make the necessary filings within the ten days required by § 754, which "precluded the district court from using § 754 as a stepping stone on its way to exercising *in personam* jurisdiction." 74 F.3d at 290. Thus, he says, the court's discussion of § 1692 was unnecessary. Haire may be technically correct, but it is apparent that the *Vision Communications* court did not think so. The court made clear that, but for the failure to comply with § 754, the "interplay between Rule 4(k)(1)(D) . . . and 28 U.S.C. § 1692 could have provided th[e] authorization" for service of process sufficient to establish jurisdiction over the person of the defendant. *Id.* at 290. And it ended its opinion with a direction to the parties that it would not have issued had it not thought § 1692 authorized the service necessary to bind the defendant:

> On remand, the court may reappoint the receiver and start the ten-day clock of § 754 ticking once again. Presumably, the receiver will take advantage of his second chance. . . . Once he does so, the receiver will have jurisdiction over the Pennsylvania property and may seek to have Vista Vision served in Pennsylvania under 28 U.S.C. § 1692.

Id. at 291.

The defendant asks us to cast aside our statements in *Visions Communications*, as well as the Sixth Circuit's decision in *Haile*, and accept instead the analysis found in an unpublished opinion from the Northern District of Illinois. That court held that § 1692 "merely authorizes extraterritorial service of process in aid of *in rem* actions and does not do so in cases like this one in which the receiver seeks an *in personam* judgment." *Stenger v. World Harvest Church, Inc.*, 2003 WL 22048047, at *2 (N.D. Ill. 2003). The basis for the *Stenger* court's conclusion was that § 1692 "does not mention *service* of process; rather it speaks only of *issuance* and *execution* of process." *Stenger*, 2003 WL 22048047, at *2. In the *Stenger* court's view, "service of process" and "issuance of process" are not the same thing: only "service" achieves *in personam* jurisdiction; "issuance" is merely the "Clerk's ministerial act of issuing a summons to a plaintiff so that he or she can serve it on the defendant." *Id.* Moreover, *Stenger* continued, "service" and "execution" are also different: while "service" achieves *in personam* jurisdiction, "execution of process involves the act, in an *in rem* action, of attaching property." *Id.*

Section 1692 states that "in a district court where a receiver is appointed for property" — which is the case of the district court here — "process may issue and be executed." 28 U.S.C. § 1692. As *Stenger* concedes, "process" generally refers to "a summons or writ, [especially] to appear or respond in court." *Stenger*, at *2 (quoting BLACK'S LAW DICTIONARY 1222 (7th ed. 1999)). The remaining question,

therefore, is the meaning of "may issue" and "be executed." And neither Congress nor the courts have restricted those terms to the meanings insisted upon by *Stenger*.

Even if *Stenger* were correct that "issuance" is merely the "Clerk's ministerial act of issuing a summons," federal rules, statutes, and court opinions have used "execution" as more than merely a synonym for "attaching property." Indeed, Rule 79 of the Federal Rules of Civil Procedure uses "execution of process" as roughly synonymous with "service of process." *See* FED. R. CIV. P. 79 (requiring that the civil docket contain entries showing "the substance of each order or judgment of the court and of the returns showing execution of process"). In that sense, providing that a summons "may issue and be executed" means that the summons may issue and be served. *See also* BLACK'S LAW DICTIONARY, at 589, meaning 1 (defining execution as the "act of carrying out or putting into effect (as a court order)").

"Execution" is also often used to mean the method by which a judgment, including a judgment *in personam*, is enforced.[4] This is as distinct from "attachment," which is often used to denote the method

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[4]Indeed Rule 69, entitled "Execution," provides that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution." FED. R. CIV. P. 69(a); *see also* FED. R. CIV. P. 62 (providing that "no execution shall issue upon a judgment" until 10 days after its entry); 28 U.S.C. § 1961 (declaring that "[i]nterest shall be allowed on any money judgment," and that "execution therefor may be levied by the marshal").

by which *in-rem* (or *quasi-in-rem*) jurisdiction is obtained.[5] In this sense, then, "may issue and be executed" describes the entire process from initial issuance, through service, through judgment, to final enforcement of judgment.

There is also no support for *Stenger*'s insistence that "issuance" is limited to a clerk's ministerial act. Congress has used "issue" as shorthand to comprehend the phase of the process that extends from issuance of an order through and including its service.[6] Similarly,

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[5]*See* 4A WRIGHT & MILLER § 1070, at 291–92; *see also Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (finding no jurisdiction because, since the property at issue "was not attached" and its "first connection with the case was caused by a levy of the execution," it was therefore not "disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him"); 28 U.S.C. § 1921 (providing for the collection of fees for different writs, including a writ of "execution," and a writ of "attachment in rem").

[6]*See* 15 U.S.C. § 77v(b) (providing that in "case of contumacy or refusal to obey [an SEC] subpoena issued to any person," federal courts "may issue to such person an order requiring such person to appear before the Commission"); 28 U.S.C. § 2361 (providing that in "any civil action of interpleader or in the nature of interpleader . . . a district court may issue its process for all claimants"); Credit Mobilier Act, ch. 226, § 4, 17 Stat. 485, 509 (March 3, 1873) (providing that the "court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties"); *see also Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 624 (1925) (noting that the Credit Mobilier Act provided jurisdiction *in personam* over defendants living in different states).

courts frequently use "issuance" and "service" interchangeably.[7]

In sum, common legal usage of the words employed in § 1692 support the views expressed by this court in *Vision Communications*, by the First and Sixth Circuits in *American Freedom Train* and *Haile*, and by scholarly commentary. Accordingly, we decline to part company with those views, and we conclude that the "interplay" between Rule 4(k) and 29 U.S.C. §§ 754 and 1692 properly provided the district court with jurisdiction over the person of Mr. Haire.[8]

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[7]*See, e.g., Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 (1987) ("[I]t is unclear at this time whether it is open to us to fashion a rule authorizing *service of process*. At common law, a court lacked authority to *issue process* outside its district, and Congress made this same restriction the general rule when it enacted the Judiciary Act.") (emphasis added); *Robertson*, 268 U.S. at 622–23 ("In a civil suit in personam, jurisdiction over the defendant . . . implies . . . either voluntary appearance by him or *service of process* upon him. . . . Under the general provisions of law, a United States District Court cannot *issue process* beyond the limits of the district.") (emphasis added); *In re: Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003) ("The proposition that the federal court lacks the power to *issue nationwide process* must be qualified by the proviso 'unless a federal statute authorizes this step'; and one of the claims in the master complaint rested on RICO, which does authorize nationwide *service of process*.") (emphasis added).

[8]We also reject Haire's contention that, even if § 1692 authorizes the exercise of personal jurisdiction over him, to do so would violate the Due Process Clause because he lacks "minimum contacts" with the District of Columbia. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This circuit has held that the requirement of "minimum contacts" with a forum state is

III

The defendant's remaining challenges to the district court's denial of his motion to dismiss, and to its grant of the receiver's motion for summary judgment, require only brief discussion.[9]

A

Haire sought dismissal of the complaint on three grounds in addition to personal jurisdiction. First, he contended that venue was improper in the District of Columbia to enforce a contract signed in Florida between two Florida residents. But the district court correctly concluded that, because the receiver's complaint was brought to accomplish the objectives of the Receivership Order and was thus ancillary to the court's exclusive jurisdiction over the receivership estate, venue was properly established. Jan. 2003 Mem. Op. at 5; *see Haile*, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well."); 20 WRIGHT & MILLER § 10, at 52–53 (noting with

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inapplicable where the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process. *Briggs v. Goodwin*, 569 F.2d 1, 8–10 (D.C. Cir. 1977), *rev'd sub nom. on other grounds, Stafford v. Briggs*, 444 U.S. 527 (1980). In such circumstances, minimum contacts with the United States suffice. *See generally* 4 WRIGHT & MILLER § 1068.1, at 605–06.

[9]In addition to the core arguments set forth below, we have considered all of Haire's myriad variations and sub-arguments as well. We have concluded that they are without merit, and that they do not merit further discussion.

approval that, "where ancillary jurisdiction sufficed to allow a claim or a party without jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party"); *see also Scholes v. Lehman*, 56 F.3d 750, 753 (7th Cir. 1995) ("The laying of venue . . . is authorized by 28 U.S.C. § 754, which allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country.").

Second, Haire sought dismissal on the ground that the Note provides that all related actions must be brought in local Florida courts. Although Haire styled this as a forum non conveniens argument, his challenge centered not on the inconvenience or burden of litigating in the District of Columbia, but rather on the Note's forum selection clause. That clause states:

> Venue for any legal proceeding arising under this Note or the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida and Maker and Holder waive any right to sue or be sued in any other venue *unless it shall be lawfully required that venue for any legal proceeding lie elsewhere.*

Promissory Note at 2 (J.A. 29) (emphasis added). In arguing that the forum selection clause requires suit in Florida, Haire ignores the clause's exception for cases in which "it shall be lawfully required that venue . . . lie elsewhere." *Id.* As the district court correctly concluded, the Receivership Order satisfies that exception. That Order, which was affirmed by this circuit in an earlier proceeding, provides that the United States District Court for the District of

Columbia "shall have *exclusive* jurisdiction over the Receivership Estate," and that "no person or entity shall bring any claim against . . . the Receivership Estate in any forum other than this Court." *Bilzerian*, 127 F. Supp. 2d at 234 (emphasis added), *aff'd*, 2003 WL 22176183 (D.C. Cir. 2003).

Finally, Haire contended that dismissal was required because the receiver failed to join OHLP, the original holder of the Note, as mandated by Rule 19(a)(1). *See* FED. R. CIV. P. 19(a)(1) ("Joinder of Persons Needed for Just Adjudication"); *see also* FED. R. CIV. P. 12(b)(7). Haire asserted that OHLP had fraudulently induced him to sign the Note, and that OHLP had to be joined in order for him to effectively raise that defense. But as Haire himself maintains, the receiver's only rights with respect to the Note were "derived from the assignment by OHLP," and "[a]s an assignee, [the receiver] merely step[ped] in the shoes of the assignor." Appellant's Br. at 30 (citing *Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 153 (D.C. Cir. 2002)). Accordingly, as both parties agree, the receiver was "subject to all defenses and rights of setoff that Haire ha[d] against OHLP." Appellant's Br. at 31; *see* Appellee's Br. at 31–32. Because OHLP's presence was not needed for Haire to raise those defenses, "complete relief" could "be accorded among those already parties" and OHLP was not a necessary party. FED. R. CIV. P. 19(a)(1).[10]

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[10]Haire was also free, as the district court noted, to pursue claims for breach of contract, misrepresentation, and fraud that he had filed against OHLP in state court. Jan. 2003 Mem. Op. at 8. At the same time, there was no risk of double recovery against

B

Haire also appeals the district court's order granting summary judgment for the receiver, which held, inter alia, that Haire had to pay the receivership estate the principal amount of $1 million plus unpaid and accrued interest. *See* July 2003 Mem. Op. at 26. The purported issues of material fact that Haire asserted in opposing the receiver's motion for summary judgment did not contest anything in the receiver's statement of facts, but instead contested entry of judgment on the grounds of personal jurisdiction, venue, fraudulent inducement, breach of contract, and duress. The first two grounds raised issues identical to those raised in Haire's motion to dismiss, grounds that we rejected in Parts II and III.A. The remaining three are without merit.

Haire's first contention was that he was fraudulently induced into signing the Note. Haire's affidavit asserted that Bilzerian's wife (who controlled OHLP) had assured him that Bilzerian possessed no interest in OHLP's assets, and claimed that Haire did not learn the assurance was untrue (and that the assets were subject to claims by Bilzerian's creditors) until December 2001, more than a year after he signed the Note. But the district court found on the undisputed facts that the receiver had served Haire with copies of the December 2000 Receivership Order on "at least two occasions, the first being on December

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Haire because the consent judgment gave the receiver the sole right to enforce the Note. *See* Consent and Undertakings Agreement at 5 (J.A. 87).

22, 2000." July 2003 Mem. Op. at 17–18.[11] That Order decreed that the receivership estate "shall be comprised of" Bilzerian's assets, "including but not limited to . . . Overseas Holdings Limited Partnership," and was transmitted with a cover letter notifying recipients that those assets were to be "immediately surrendered to the Receiver." *Id.* (quoting Receivership Order and cover letter). Then, on March 21, 2001 — three months *after* he received this notice that OHLP's assets were subject to the claims of the receivership estate — Haire signed an extension agreement (the Forbearance and Extension Agreement) with OHLP that reaffirmed his obligations under the Note. That reaffirmation, the court held, waived any fraud defense he might have under Florida law. We agree. *See Harpold v. Stock*, 65 So. 2d 477, 478 (Fla. 1953); *Price v. Airlift International, Inc.*, 181 So. 2d 549, 550–51 (Fla. App. Ct. 1966).

Second, Haire contended that OHLP had breached its obligation under the Note by failing to permit him to sell the stock he had pledged as security. But the Note does not mention any such obligation, and the district court correctly found that evidence of a prior or contemporaneous oral agreement is inadmissable under Florida's parol evidence rule when — as here — the contract is unambiguous. *See Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000).

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[11] Haire's opposition to summary judgement did not dispute the receiver's statement that she had served two copies of the Receivership Order upon him in December 2000. *See* Ernest B. Haire's Opp'n to Receiver's Mot. for Sum. J.

Finally, Haire alleged that *OHLP* had assigned the Note to the receiver under duress. Even if that were true, it would not offer *Haire* a defense to payment on the Note. Moreover, this court has previously held that Haire lacks standing to collaterally attack the consent judgment in which OHLP agreed to assign the Note to the receiver. *See SEC v. Bilzerian*, 2002 WL 1998001, at *1 (D.C. Cir. 2002). Accordingly, the court's grant of summary judgment for the receiver was appropriate.

IV

For the foregoing reasons, we affirm the district court's denial of Haire's motion for dismissal of the receiver's complaint, as well as the court's grant of the receiver's motion for summary judgment.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH R. MESHULAM, AS RECEIVER FOR THE SEC v. PAUL BILZERIAN, CIVIL ACTION NO. 89-1854 (SSH) RECEIVERSHIP ESTATE,	)
Plaintiff,	)
v.	)No.1:02cv1221(RCL)
ERNEST B. HAIRE, III,	)
Defendant.	)

MEMORANDUM AND ORDER

This matter comes before the Court on defendant Ernest B. Haire III's ("defendant") motion to dismiss [6-1], which was filed on November 18, 2002. Upon consideration of defendant's motion, receiver-plaintiff's opposition thereto, defendant's reply brief, and the applicable law in this case, the Court finds that the defendant's motion should be denied.

A. FACTUAL BACKGROUND

This case represents an outgrowth of SEC v. Bilzerian, Civil Action Number 89-1854, which was a civil action brought against Paul A. Bilzerian over a decade ago. In 1993, the Court entered two judgments

against Bilzerian, ordering him to disgorge over $33 million in unlawful profits and over $29 million in prejudgment interest. In November of 1998, the Securities and Exchange Commission commenced contempt proceedings against Bilzerian for his refusal to comply with these orders. These proceedings resulted in a finding of contempt against Bilzerian, and on December 22, 2000, the Court appointed a receiver over Bilzerian's assets, in accordance with the equitable discretion bestowed upon it under the federal securities laws. The Court later amended this order on March 1, 2002. The orders encompassed Bilzerian's legal and equitable interests in the assets of Overseas Holdings Limited Partnership ("OHLP").

In July of 2000, defendant executed a promissory note in favor of OHLP in the amount of $1 million. On January 16, 2002, the Court ordered OHLP to transfer all of its rights, title, and interests in this note to the receiver of the Bilzerian assets. On June 19, 2002, the receiver commenced the instant proceedings against defendant.

II. ANALYSIS

A. Personal Jurisdiction

Defendant alleges that this Court lacks personal jurisdiction over him. Defendant is mistaken. A year and a half ago, during the Bilzerian case, this Court addressed a similar contention by defendant, which warrants quotation at some length:

Both the 1994 Trust and Ernest B. Haire, III,

argue that the Court does not have jurisdiction over them and thus cannot impose a freeze on their assets. They are mistaken. . . .The statutory language of 28 U.S.C.§ 1692 makes clear that this Court's Orders are binding upon the 1994 Trust and Mr. Haire, so long as the Receiver has complied with the requirements of 28 U.S.C. § 754. The Receiver has perfected her jurisdiction over the property of the receivership pursuant to 28 U.S.C. § 754. Therefore, 28 U.S.C. § 1692 establishes that the Court has jurisdiction over the Bilzerian and Bilzerian-related property in Florida, "as if the property lay wholly within" the District of Columbia. The Court has determined that the 1994 Trust and Cimetrix stocks held by Mr. Haire are Bilzerian-related property in Florida, and therefore, the Court has jurisdiction over that property pursuant to 28 U.S.C. § 1962.

Nevertheless, Mr. Haire and the 1994 Trust claim that they are not parties to this action and cannot be forced to comply with an order of this Court. The Federal Rules of Civil Procedure, however, specify that non-parties against whom "obedience to an order may be lawfully enforced" are subject to the "same process for enforcing obedience to the order as a party." Fed. R. Civ. P.71.

Therefore, because the Court finds that it has jurisdiction over the 1994 Trust and Mr. Haire sufficient to support the relief requested by the Receiver. . . ., the Motions of the 1994

Trust and Mr. Haire are hereby DENIED.

Order dated June 1, 2001, at 5-6 (emphasis added).[1]

The plain language of this Order belies defendant's assertions that it only resolved the issue of the Court's in rem jurisdiction over defendant's property, not jurisdiction over defendant's person. It was necessary for the Court to exert jurisdiction over the person of defendant because a portion of the relief ordered was directed to defendant himself, not to the property owned by him. See id, at 3-4 ("[I]t is further ORDERED that, by June 8, 2001, the 1994 Trust, Puma and Ernest B. Haire III . . . shall turnover all Cimetrix Securities presently held by the 1994 Trust, Puma and/or Ernest B. Haire III . . . to the Court's registry."). And, as a case cited by defendant points out, "[i]njunctive relief, by its very nature, can only be granted in an in personam action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining in personam jurisdiction over that person or someone in legal privity with that person." R.M.S.

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[1]28 U.S.C. § 754 provides, in relevant party, that "[a] receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof." 28 U.S.C. § 1692 provides that "[i]n proceedings in a district court where a receiver is appointed for property, real personal, or mixed, situated in different districts, process may issue and be executed in any district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts."

Titanic, Inc. V. Haver, 171 F.3d 943, 957 (4th Cir. 1999).

The complaint in this action, the allegations of which are presumed true for purposed of this motion, states that this action was brought in order to "accomplish certain of the objectives of the Receivership Order" entered in the proceedings against Bilzerian. Compl. ¶ 4. Therefore, it is an ancillary proceeding to the Bilzerian case. Haile v. Henderson Nat'l Bank, 657 F.2d 816, 822 ("[T]he initial suit which results in the appointment of the receiver is the primary action and ....any suit which the receiver thereafter brings in the appointment court in order to exercise his duties is ancillary to the main suit."); Tcherepnin v. Franz, 485 F.2d 1251, 1255-56 (7th Cir.1973) (:So long as an action commenced by a court appointed receiver seeks to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the ... court of the United States is concerned.") (citation omitted). This Circuit has stated that in an ancillary action brought by a receiver, the district court's jurisdiction "extends to any district in which receivership property may be found 'provided that the proper documents have been filed as required by § 754.'" SEC v. Vision Communications, Inc., 74 F.3d 287, 291 (D.C. Cir. 1996) (quoting Moore's Federal Practice). The receiver has filed the documents required under Section 754 with the U.S. District Court for the Middle District of Florida. Compl.¶ 1. Her compliance with that section extends the jurisdiction of this Court to the Middle District of Florida. Vision Communications, 74 F.3d at 290.

The minimum contacts analysis developed in International Shoe and its progeny does not apply to cases in which nationwide service of process has been provided for under 28 U.S.C. § 1692, as in this case:

> In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of International Shoe do not apply . .. The process authorized by § 1962 is not "extra-territorial" but rather nationwide. The appointment court's process extends to any judicial district where receivership property is found. As such, the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite.

Haile, 657 F.2d at 825, 826. Rather, the question of constitutional due process is restricted to the issue of "whether the service [of process] was reasonably calculated to inform the defendants of the pendency of the proceedings against them in order that they might take advantage of the opportunity to be heard in their defense." Id. At 826. Defendant has been properly served with process. Def's Mem. In Support of His Mot. To Dismiss at 2 n.1. There is no allegation that the process served upon him failed to provide him with adequate notice of the proceeding against him. The requirements of due process have been satisfied by the proper service of process upon defendant. Accordingly, this Court has established jurisdiction over defendant's person. See Federal Rules of Civil Procedure 4(k)(1)(D) ("Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a

defendant . . . when authorized by a statute of the United States.")

B. Venue

Defendant also alleges that the complaint lacks sufficient facts to demonstrate that venue properly lies with this Court, and that the Note and Stock Pledge Agreement provide for venue in another forum. As noted above, because the complaint states that the present action was brought "to accomplish certain objectives of the Receivership Order," it is an ancillary proceeding to SEC v. Bilzserian. Compl. ¶ 4. Where ancillary jurisdiction has been properly established, proper venue lies as well. See Haile, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well")(citing cases); 20 Wright & Miller, Federal Practice & Procedure Deskbook § 10 ("It was usually held that where ancillary jurisdiction sufficed to allow a claim or a party without independent jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party. The new statute has done nothing to change this, and the result seems right."). Therefore, the allegations in the complaint that "this is an action to accomplish certain objectives of the Receivership Order" and that "[v]enue is proper in this Court based upon, among other things, the Receivership Order [and] this Court's exclusive jurisdiction over the Receivership Estate" suffice to demonstrate that venue properly lies with this Court. The venue statute, 28 U.S.C. § 1391, does not alter this result. Section 1391 (b) lists the judicial districts in which venue for a non-diversity case properly lies,

"except as otherwise provided by law." Because venue in this case has been established in this jurisdiction by law, the venue provisions of Section 1391 (b) do not apply here.

Additionally, neither the Note nor the Stock Pledge Agreement mandate that venue lies in another forum. The Note provides that

> [v]enue for any legal proceeding arising under this Note or on the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida and maker and Holder waive any right to sue or be sued in any other venue unless it shall be lawfully required that venue for any legal proceeding lie elsewhere.

Compl. Exh. C at 2 (emphasis added). As stated above, it has been established by law that proper venue for this action lies within this jurisdiction. Moreover, "even a mandatory forum-selection clause does not in fact divest a court of jurisdiction that it otherwise retains." Silva v. Encyclopedia Britannica, 239 F.3d 385, 389 n.6 (1st Cir. 2001). The qualifying language in the clause demonstrates that it is not a mandatory forum selection clause. Therefore, it is not necessary to dismiss this action for lack of proper venue.

C. Forum Non Conveniens

Defendant also urges this Court to dismiss this action based on the doctrine of forum non conveniens. As grounds for dismissal, defendant lists the forum selection clause, the fact that he resides in Florida,

that the plaintiff-receiver and her attorneys maintain an office in Florida, and that a related case is pending in Florida state court.

Defendant's assertion that the forum selection clause compels dismissal has already been determined to be without merit. As for the remaining grounds, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." Piper Aircraft Co. V. Reyno, 454 U.S. 235, 255 (1981). A defendant seeking dismissal on forum non conveiens grounds must clearly demonstrate that litigation in the plaintiff's chosen forum would be vexatious and oppressive out of all proportion to plaintiffs' convenience in order to overcome the presumption in favor of plaintiffs' choice of forum. DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 30 (2d Cir. 2002). The Court finds that defendant has failed to make this demonstration. Without such a showing, dismissal is not warranted because a dismissal on forum non conveniens grounds is the exception, not the rule. R. Maganlal & Co. V. M.G. Chemical Co., 942 F.2d 164, 168 (2d Cir. 1991); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 46 (3d Cir. 1988).

D. Failure to Name an Indispensable Party

Defendant's final argument is that plaintiff-receiver has failed to name an indispensable party, warranting dismissal under R$ule 12(b)(7) of the Federal Rules of Civil Procedure. Dismissal is

available under Rule 12(b)(7) for failure to join a party deemed to be "indispensable" pursuant to Rule 19(b). The latter rule provides, in relevant part, that "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The subdivisions provide for mandatory joinder of person if either

> (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Defendant has failed to establish that OHLP, the original holder of the note on which the present action is based, meets the requirements of either of these subdivisions. Defendant is free to pursue his claims for damages in his state court action alleging breach of contract, negligent misrepresentation, and fraudulent misrepresentation against OHLP. Accordingly, there is no danger that the absence of OHLP from the instant proceedings will result in the inability to afford complete relief between plaintiff-receiver and defendant. Nor does the absence of OHLP

create any potential for inconsistent judgments. The basis for defendant's contention that the two actions could result in inconsistent judgments is his assertion that rescission is a remedy available to him in his state court action. However, the only remedy expressly sought by defendant in that action is damages. See Pl.'s Opp. Br., Exh.1. It may be true that the state of Florida has a "liberal policy of allowing amendments to pleadings." Burr v. Norris, 667 So.2d 424, 426 (Fl. Dist. Cl. App. 1996). Nevertheless, the issue is not whether defendant may amend his pleadings to include a claim for rescission, but whether the remedy of rescission is available to defendant. If the Florida state court were to grant rescission, their judgment could potentially be inconsistent with a judgment rendered by this Court. However, the remedy of rescission is not available to defendant in his state court action. In a recent case, the Supreme Court of Florida explained that

> [a] prerequisite to recission is placing the other party in status quo. As the court in Bass v. Farish, 616 So.2d 1146, 1147 (Fla. 4th DCA 1993), noted "Generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status." Moreover, a party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.
>
> A damages claim, by contrast, affirms the contract, and thus ratifies the terms of the agreement. This principle ensures that a party

> who "accepts the proceeds and benefits of a contract" remains subject to "the burdens the contract places upon him."
>
> As previously stated, the necessary precondition for rescission is tender of the benefits received under the contract. In effect, [appellants] elected to affirm the contract by not returning the settlement proceeds. As a result, they are bound by the terms of the contract[.]

Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co., 761 So.2d 306, 313 (Fla. 2000)(citations omitted). In the instant case, defendant has not tendered the benefits that he received under the terms of the note, which includes $1,000,000 plus interest, to the current holder of the note. Accordingly, because defendant has failed to restore the status quo, which the Supreme Court of Florida has identified as a necessary precondition for the equitable remedy of rescission, defendant is not entitled to that remedy. There is thus no possibility, as matters currently stand, that any relief that could be afforded in the Florida suit would prove to be inconsistent with any relief that might be granted in the instant case.

In short, defendant has failed to demonstrate that either subdivision of Rule 19(a) applies in the instant case. Because OHLP is not a party whose presence is indispensable to this case, there is no basis for this Court to dismiss under Rule 12(b)(7).

III. CONCLUSION

Defendant has failed to demonstrate that dismissal of the present action is warranted. Accordingly, it is hereby ORDERED that defendant's motion to dismiss [6-1] be, and hereby is, DENIED.

SO ORDERED.

Date: 1/17/03

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5237 September Term, 2004
02cv01221
Filed On: October 26, 2004

Securities and Exchange Commission,
Appellee

v.

Paul A. Bilzerian and Deborah Meshulam,
Appellees

Ernest B. Haire,
Appellant

BEFORE: Sentelle, Rogers, and Garland, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed September 27,2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Nancy G. Dunn
Nancy G. Dunn
Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT TO THE U.S. CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * *

28 U.S.C. § 754.

754. Receivers of property in different districts.

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

* * * * * * * * * * *

28 U.S.C. § 1692

1692. Process and orders affecting property in different districts.

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

(3)

Supreme Court, U.S.
FILED
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CLERK

No. 04-1012

IN THE

Supreme Court of the United States

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, Receiver,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the exercise of nationwide service of process arising in an ancillary action to a federal receivership proceeding satisfies due process concerns where the receiver perfected her appointment in the judicial district where the defendant resides and there is no evidence of inconvenience or burden on the defendant that rises to a level of Constitutional concern.

2. Whether venue of an action ancillary to a federal receivership case is proper in the receivership court when the receiver perfected her appointment in the judicial district where the defendant resides.

LIST OF PARTIES

The Petitioner is Ernest B. Haire, III. The Respondent is Deborah R. Meshulam, Esq., as Receiver. The Receiver was appointed by the United States District Court for the District of Columbia to satisfy Securities and Exchange Commission disgorgement judgments entered against Paul A. Bilzerian. There is no parent or subsidiary corporation of any party to be listed.

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IN THE

Supreme Court of the United States

No. 04-1012

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, Receiver,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Deborah R. Meshulam, Receiver, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 378 F.3d 1100.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 378 F.3d 1100, and is reprinted in appendix to the Petition for Writ of Certiorari at A1-20.

JURISDICTION

The Respondent Receiver invoked the jurisdiction of the United States District Court for the District of Columbia pursuant to 28 U.S.C. §§ 754 and 1692. The United States

Court of Appeals of the District of Columbia Circuit entered judgment on August 13, 2004, and denied a motion for rehearing on October 26, 2004. Mr. Haire has invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are 28 U.S.C. §§ 754 and 1692, which are reprinted in the appendix to the Petition for Writ of Certiorari at A35-36.

COUNTERSTATEMENT OF THE CASE

This is an action ancillary to a federal receivership that was established as adjunct to an enforcement proceeding brought by the Securities and Exchange Commission (the "SEC") against Paul A. Bilzerian in 1989. *SEC v. Bilzerian*, 127 F. Supp. 2d 232 (D.D.C. 2000).[1] The Receivership Estate was established in order to satisfy decade old disgorgement judgments entered against Mr. Bilzerian in 1993 in excess of $60 million. *Id.*; *Securities and Exchange Comm'n v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993) and *Securities and Exchange Comm'n v. Bilzerian*, 1993 WL 542584 (D.D.C. Jun. 25, 1993), *aff'd* 29 F.3d 689 (D.C. Cir. 1994). The Receiver perfected her appointment in multiple judicial districts, including the Middle District of Florida where Mr. Haire resides.

In August 2000, the District Court held Mr. Bilzerian in contempt of the disgorgement judgments. *Securities and Exchange Comm'n v. Bilzerian*, 112 F. Supp. 2d 12, 17 (D.D.C. 2000). This result was based, among other things, on the Court's finding that Mr. Bilzerian had "transferred his sub-

---

[1] The main action was brought by the SEC against Mr. Bilzerian under the federal securities laws following Mr. Bilzerian's criminal conviction for securities fraud and conspiracy to defraud the United States. *See United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991).

stantial assets into a complex ownership structure of off-shore trusts and family-owned companies and partnerships," including the Paul A. Bilzerian and Terri L. Steffen 1994 Irrevocable Trust (the "1994 Trust") and Overseas Holdings Limited Partnership ("OHLP"). *Id.* at 18-19. Petitioner Ernest B. Haire, III is a trustee of the 1994 Trust, and is Mr. Bilzerian's neighbor.

During the pendency of the contempt proceeding against Mr. Bilzerian, OHLP purportedly lent Mr. Haire $1 million. In exchange, Mr. Haire executed a promissory note in favor of OHLP (the "$1 Million Note" or the "Note"). The Note is a Receivership asset and is the subject of the proceedings below.

In December 2000, the Court created the Receivership Estate, appointed Deborah R. Meshulam as Receiver, required that all assets be turned over to her, and authorized her to:

> [T]ake such actions as are necessary and appropriate to identify, recover, preserve, take control of and prevent the dissipation, concealment or disposition of any assets of Bilzerian, and to liquidate any interests in any asset held by anyone on behalf of Bilzerian, including, but not limited to the initiation and prosecution of litigation against others to recover such asset and/or interests in assets on behalf of the Receivership Estate.

Securities and Exchange Comm'n v. Bilzerian, 127 F. Supp. 2d 232, 233 (D.D.C. 2000); *aff'd* Nos. 01-5008, 01-5242, 01-5264, 02-5033, 02-5060, 2003 WL 22176183 (D.C. Cir. Sept. 22, 2003).

Upon her appointment, the Receiver put Mr. Haire on notice of the Receivership Order by serving him with a copy of the Order in December 2000 and again in February 2001; at that time, the Receiver also notified Mr. Haire that, pursuant to the terms of the Order, (1) the Receivership Estate is comprised of Mr. Bilzerian's interests in assets including, among other things, the assets of OHLP, (2) Mr. Haire was

required to provide the Receiver with access to assets, books, records and other property of OHLP, and (3) the District Court had exclusive jurisdiction over the Receivership Estate. In addition, in her February 2001 correspondence, the Receiver provided Mr. Haire with copies of District Court orders holding Mr. Bilzerian in contempt and, thereafter, incarcerating him for his failure to provide documents and information related to various entities including OHLP. Mr. Haire never denied receiving these notices.

At the time the Receiver served Mr. Haire with the Receivership Order and notified him of his obligation to provide her with access to assets and records of OHLP, the $1 Million Note was due and payable; Mr. Haire owed OHLP $1 million, plus a late fee and other associated amounts. Rather than advise the Receiver of his debt to OHLP as required by the Receivership Order, Mr. Haire acted in secret and in concert with OHLP to alter substantially the $1 Million Note by executing a Forebearance and Extension Agreement "as of" March 1, 2001. That Agreement purported to extend the Note, which was then due and owing, until March 2003. At that time, acting again in secret and in concert with OHLP and Bilzerian allies, Mr. Haire also purported to make an interest payment on the $1 Million Note, but diverted that payment to Bilzerian-nominees, rather than sending it to the Receiver or OHLP.

Pursuant to a Consent Judgment subsequently entered in the Receivership proceeding in January 2003, OHLP assigned 100% of its interest in the $1 Million Note to the Receivership Estate. Mr. Haire had notice of the Consent Judgment, consented to it in his capacity as a trustee of the 1994 Trust and did not object to it in any capacity. Nevertheless, Mr. Haire subsequently attempted to appeal entry of the Consent Judgment. The United States Circuit Court for the District of Columbia dismissed that appeal for lack of standing. *Securities and Exchange Comm'n v. Bilzerian*, No. 02-5061,

2002 WL 1998001 (D.C. Cir. Aug. 29, 2002). Thereafter, that Court affirmed the Consent Judgment. *Securities and Exchange Comm'n v. Bilzerian*, Nos. 01-5008, 01-5242, 01-5264, 02-5033, 02-5060, 2003 WL 22176183 (D.C. Cir. Sept. 22, 2003).

Following OHLP's assignment of the Note to the Receivership Estate, Mr. Haire defaulted on the Note. Pursuant to the Note's terms, the Receiver declared the entire amount immediately due and payable. When Mr. Haire failed to repay the $1 Million Note to the Receivership Estate, the Receiver commenced this ancillary action in order to recover those funds and discharge her duty to collect and liquidate Receivership Assets for the purpose of satisfying the civil disgorgement judgments entered against Mr. Bilzerian. In accordance with the Receivership Order vesting the Receivership Court with exclusive jurisdiction over the Receivership Estate, the ancillary action was filed in the District Court for the District of Columbia.

Mr. Haire waived service of the summons and subsequently the Receiver filed a motion for summary judgment. Mr. Haire responded by filing a motion to dismiss the Receiver's complaint and opposing the Receiver's motion for summary judgment on the grounds of lack of personal jurisdiction, forum non conveniens and failure to name OHLP as an indispensable party. The Receivership Court denied Mr. Haire's motion to dismiss and granted the Receiver's motion for summary judgment. The Receivership Court found that it had personal jurisdiction over Mr. Haire pursuant to the authorization of nationwide service of process in 28 U.S.C. § 1692, and that venue of the action ancillary to the Receivership proceeding was proper in the Receivership Court. The United States District Court for the District of Columbia Circuit affirmed.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPECIAL NEED FOR THIS COURT'S GUIDANCE ON THE JURISDICTIONAL ISSUES RAISED BY MR. HAIRE.

A. There is No Circuit Split or Other Circumstance Warranting This Court's Review of the Predicate Statutory Question.

The constitutional question presented by Mr. Haire assumes that the governing statute—28 U.S.C. § 1692—authorizes nationwide service of process. In a footnote to his petition, however, Mr. Haire indicates that he also seeks review of that issue, which he contends is "fairly included" in his constitutional question.[2] Pet. at 5 n.1.

Assuming that this issue is properly before the Court, whether 28 U.S.C. § 1692 authorizes nationwide service of process is not a question on which this Court's guidance is

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[2] The question presented is narrowly framed and focuses on the requirements of the Due Process Clause "when a court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process." Thus, rather than including the question of whether section 1692 authorizes nationwide service of process, the question, as presented, appears to expressly exclude it. Nevertheless, in light of footnote 1 and the Court's longstanding reluctance to address a constitutional issue without first confirming that there is a statutory basis for its consideration, the Receiver addresses the statutory question herein. *See Fry v. United States*, 421 U.S. 542, 546 n.5 (1975) (addressing whether the Economic Stabilization Act of 1970 applied to state employees before considering the Act's constitutionality, notwithstanding the petitioners' failure to raise the statutory issue in either their petition or their brief; "Rather than decide a constitutional question when there may be doubt whether there is any statutory basis for it [], we deal first with the statutory question . . . ."); *United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Our normal course is first to 'ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'") (citations omitted).

needed. Indeed, Mr. Haire fails to identify even one reason why certiorari should be granted on this issue.

There are, however, three reasons why certiorari is not proper. First, it is premature for this Court to consider whether section 1692 authorizes nationwide service as only three federal circuits have addressed this issue. Second, because those three courts have all concluded that the statute does authorize nationwide service of process, there is no circuit split to resolve. *Securities and Exchange Comm'n v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004); *Securities and Exchange Comm'n v. Vision Communications, Inc.*, 74 F.3d 287, 288 (D.C. Cir. 1996); *American Freedom Train Foundation v. Spurney*, 747 F.2d 1069, 1073 (1st Cir. 1984); *Hale v. Henderson Nat. Bank*, 657 F.2d 816, 817 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).[3] With one exception, the district courts are in accord. *See, e.g., Terry v. Dempsey*, No. Civ. A. 3:04 CV 00040, 2004 WL 3135469 (W.D. Va. Nov. 12, 2004); *U. S. Small Bus. Admin. v. Chimicles*, No. 03-5987, 2004 WL 2223304 (E.D. Pa. Sept. 22, 2004); *Terry v. June*, No. Civ. A 3:03 CV 0047, 2003 WL 21738299 (W.D. Va. July 21, 2003); *Securities and Exchange*

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[3] Mr. Haire cites to *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 301 (4th Cir. 2001), for the proposition that a court's *in rem* jurisdiction over receivership property is not synonymous with personal jurisdiction over persons residing in other districts. Pet. at 6-7 n. 2. Mr. Haire fails to explain the relevance of *Gilchrist* to his petition and there is none. In *Gilchrist*, the Fourth Circuit merely opined that, standing alone, section 754—which extends the receivership court's *in rem* jurisdiction to districts where the receiver timely files the governing complaint and order of appointment—does not vest the court with coextensive personal jurisdiction over persons in such other districts. Significantly, however, the Fourth Circuit did not address the interplay between 28 U.S.C. §§ 754 and 1692 that serves as the statutory basis for jurisdiction here. Indeed, the Court did not even address section 1692 and specifically stated that it was "not rul[ing] on the question whether the district court has personal jurisdiction over the Georgia creditors" as that issue had "been addressed neither by the parties nor by the district court." *Id.* at 301-02.

Comm'n v. Cook, 2001 WL 803791 (N.D. Tex. 2001); *Select Creations, Inc. v. Paliafito America, Inc.*, 852 F. Supp. 740, 781 (E.D. Wis. 1994). *But see Stenger v. Leadenhall Bank & Trust Co.*, No. 02 C 8655, 2004 WL 609795, at *8 (N.D. Ill. March 23, 2004) (finding 28 U.S.C. §§ 754 and 1692 did not authorize nationwide service of process); *Stenger v. World Harvest Church, Inc.*, No. 02-C-8036, 2003 WL 22048047, at *2 (N.D. Ill. Aug. 29, 2003) (same). Third, compared to the frequency with which other procedural rules and statutes are put at issue, section 1692 is not often invoked. Accordingly, there is no compelling reason for the Court to use its power of certiorari to address this statute.

B. The Court Should Decline Petitioner's Invitation to Address the Constitutional Issue Presented Because Guidance is Not Needed on the Predicate Statutory Question, the Circuit Split Concerning the Appropriate Due Process Analysis is Not Well Developed and Has Not Resulted in Inconsistent Outcomes and This Case is Not an Appropriate Vehicle to Address the Conflict.

1. *The Predicate Statutory Question Is Not One On Which the Court's Guidance Is Needed.*

The existence of "a national service provision is a necessary prerequisite for a court to even consider a national contacts approach." *Go Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (*citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102-03 n.5 (1987)). As discussed in Section I, *supra*, this predicate statutory question does not satisfy any of this Court's criteria for isuance of certiorari. Accordingly, certiorari should also be denied on the constitutional question which follows therefrom.

2. *The Asserted Conflict is Not Well Developed and Has Not Resulted in Inconsistent Outcomes.*

Where a federal statute authorizes nationwide service of process, there is a general agreement among the circuits that a court should "examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (citation omitted). *See also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *cert. denied*, 523 U.S. 1048 (1998); *Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000); *Peay v. Bellsouth Medical Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *In re Federal Fountain, Inc. v. KR Entertainment, Inc.*, 165 F.3d 600, 602 (8th Cir. 1999); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1257-58 (5th Cir. 1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 958 (1st Cir. 1984); *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974).

The issue on which the circuits appear to diverge is whether the due process analysis ends with a finding of the defendant's "national contacts." The majority of circuits appear to conclude that it does. *See, e.g., Bilzerian*, 378 F.3d at 1106 n.8; *Federal Fountain*, 165 F.3d at 602; *Trans-Asiatic*, 743 F.2d at 958; *Mariash*, 496 F.2d at 1143. Several circuits, however, have opined that "due process requires something more." *Peay*, 205 F.3d at 1210. Specifically, the Tenth and Eleventh Circuits have held that when the defendant is served via a statute authorizing nationwide service of process, "the Fifth Amendment requires the

plaintiff's choice of forum to be fair and reasonable to the defendant." *Peay*, 205 F.3d at 1212; *Panama*, 119 F.3d at 945. *See also Denny's, Inc. v. Cake*, 364 F.3d 521, 524 n.2 (4th Cir. 2004) (finding that the district court would have personal jurisdiction over California officials pursuant to ERISA's nationwide service of process statute as long as the case before it was a proper ERISA enforcement action and "assume[ing] that the assertion over the commissioner would satisfy Fifth Amendment due process requirements"); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370 (3d Cir. 2002) ("This Court has not issued an authoritative ruling on the matter, although we have hinted that a fairness analysis consisting of more than an assessment of the defendant's national contacts would be appropriate") (citations omitted).

For three reasons, however, the distinction between the foregoing analyses is one without a difference. First, even some courts which Mr. Haire identifies as adopting a pure "national contacts" approach appear to recognize that due process might prohibit the exercise of personal jurisdiction in exceptional cases.[4] Second, although the Tenth and Eleventh Circuits require more than just a showing of "national contacts" and hold that Due Process prevents a court from exercising personal jurisdiction over a litigant where it would be unduly burdensome for the litigant to defend in that forum, these courts have "emphasize[d] that it is only in *highly*

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[4] *See Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (noting that *Peay* "relied on the observation in *Omni Capital*, 484 U.S. at 104, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have 'contacts' with a particular federal judicial district and does not block litigation in easy-to-reach forums.")

unusual cases that inconvenience will rise to a level of constitutional concern." *Panama*, 119 F.3d at 947 (emphasis added); *id.* (describing such circumstances as "rare"); *accord Peay*, 205 F.3d at 1212.

Finally, the different analyses applied by these circuits have not resulted in inconsistent outcomes. Although the *Peay* and *Panama* courts hold that Due Process protects a litigant served with nationwide process from having to defend in an excessively burdensome forum, neither those decisions nor the district courts within the Tenth and Eleventh Circuits that have subsequently applied them have found a constitutionally significant inconvenience that would preclude the exercise of jurisdiction. *See Peay*, 205 F.3d at 1213 (concluding that "defendants cannot show that their liberty interests actually have been infringed"); *Panama*, 119 F.3d at 948 (finding "no constitutional impediment to jurisdiction"); *Wing v. Storms*, No. 1:02CV127DAK, 2004 WL 724448, at *2 (D. Utah Feb. 5, 2004) (applying *Peay* analysis to a defendant served with a Receiver's complaint, but concluding "that Defendant has not met his burden of demonstrating that the inconvenience of defending a lawsuit in Utah rises to a level of constitutional concern"); *Brightway Adolescent Hospital v. Hawaii Mgmt Alliance* Ass'n, 139 F. Supp. 2d 1220 (D. Utah 2001) (finding defendant failed to demonstrate that assertion of jurisdiction would be so burdensome as to render it unconstitutional, notwithstanding the distance from Utah to Hawaii). *See also Medical Mutual of Ohio v. Desoto*, 245 F.3d 561, 568 (6th Cir. 2001) (reaffirming propriety of national contacts analysis, but noting that "[e]ven if we were to agree with the Tenth and Eleventh Circuits, we would find jurisdiction here"); *ESAB Group*, 126 F.3d 617 (finding that jurisdiction was properly exercised because there was no evidence of "extreme inconvenience or unfairness" to the defendants); *Terry v. Dempsey*, 2004 WL 3135469, at *3 ("[T]his court finds no evidence of such 'extreme inconvenience or unfairness' as would outweigh the 'congressional

policy behind the authorization of nationwide service of process provided by section 1692'") (citation omitted); *Terry v. June*, 2003 WL 21738299, at *5 (finding the burden faced by a Michigan resident having to defend an action brought by a Receiver in Virginia "is not so extreme as to implicate Due Process protections").

3. *This Case Is Not an Appropriate Vehicle to Resolve the Conflict.*

Even assuming a significant conflict existed among the Circuits, this case is not the appropriate vehicle for addressing the asserted conflict because, regardless of the analysis applied, the outcome here would be the same. Specifically, Mr. Haire cites to no evidence in the record demonstrating that the District Court's assertion of jurisdiction over him would have resulted in a constitutionally significant inconvenience.

"[T]he burden is on the defendant to show that the exercise of jurisdiction in the chosen forum will make litigation 'so gravely difficult and inconvenient' that [he] unfairly is at a 'severe disadvantage' in comparison to his opponent." *Panama*, 119 F.3d at 948 (citing *Burger King Corp.*, 471 U.S. at 478). *See also Denny's*, 364 F.3d at 524 n.2 (rejecting defendant's "tentative[]" argument that the exercise of personal jurisdiction violated the Fifth Amendment because the "Commission has not demonstrated that the district court's assertion of personal jurisdiction over him would result in 'such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy' evidenced by a nationwide service of process provision") (*citing ESAB Group*, 126 F.3d at 627). In the case below, Mr. Haire did not acknowledge or proffer any evidence that would satisfy this burden.

Instead, Mr. Haire's argument below focused on his asserted lack of contacts with the District of Columbia. The fact that a litigant does not have any contacts with a forum, however, does not mean that it would be unfair or unduly burdensome for him to litigate there. *See Panama*, 119 F.3d at 946 ("[A] defendant's contacts with the forum state play no magical role in the Fifth Amendment analysis."); *Heft v. AAI Corp.*, 355 F. Supp. 2d 757, (M.D. Pa. Jan. 24, 2005) ("State borders do not deserve significant weight in evaluating the fairness of haling a defendant into federal court") (citations omitted); *Oxford v. PNC*, 372 F. Supp. 191, 201 (E.D. Pa. 1974) ("In this age of instant communication, due process cannot be measured by the number of state borderlines one must cross. It is certainly no farther from Beaumont in the Eastern District of Texas to El Paso in the Western District of Texas (*cf.* Rule 4(f) extending a federal court's process to the territorial limits of a state), than from Portland, Me. to Raleigh, N.C. across twelve state borderlines").

"[I]n evaluating whether the defendant has met his burden 'of establishing constitutionally significant inconvenience,'" the Tenth Circuit directs courts to look at the following factors:

> (1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business, including (a) the nature and extent and interstate character of the defendant's business, (b) the defendant's access to counsel, and (c) the distance from the defendant to the place where the action was brought; (3) judicial economy; (4) the probable situs of the discovery proceedings and the extent to which the discovery proceedings will take place outside the state of the defendant's residence or place of business; and (5) the nature of the regulated activity in question and the extent of impact that the

> defendant's activities have beyond the borders of his state of residence or business.

Peay, 205 F.3d at 1212.

Although Mr. Haire denies that he had any contacts with the District of Columbia, his Statement of Facts conveniently omits one significant transaction which was knowingly and purposefully directed at the Receivership Estate. Soon after the creation of the Receivership Estate, Mr. Haire received at least two separate notices that assets of OHLP (such as the $1 Million Note) were assets of the Estate and that they were within the exclusive jurisdiction of the District Court for the District of Columbia. Acting with such knowledge, Mr. Haire extended the terms of the Note and diverted payments thereunder to Bilzerian nominees. Because Mr. Haire knew that the Note was property of the Receivership Estate and, acting with such knowledge, affirmatively modified it, he knew or should have known that a dispute concerning such conduct could arise in the Receivership Court. *See Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) (concluding that due process is satisfied when the "'defendant's . . . connection with the forum state . . . [is] such that he should reasonably anticipate being haled into court here'") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)); *Peay*, 205 F.3d 1206, 1211-12 ("Due process limits on a court's ability to exercise jurisdiction 'are designed to protect [defendants] by providing them with fair notice that their activities will render them liable to suit in a particular forum'") (citations omitted); *id.* at 1213 ("Because defendants rendered benefits in Utah, they knew or should have known that a dispute over benefits could arise in Utah"). *Cf. Asahi Metal Industry Co. v. Supreme Court*, 480 U.S. 102, 113 (1987) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*") (emphasis in original) (internal citations omitted).

Furthermore, although Mr. Haire may have been minimally inconvenienced by having to litigate in the District of Columbia, he did not and "cannot show that this burden rises to the level of a constitutional concern." *Peay*, 205 F.3d at 1213. There is nothing in the record demonstrating that he lacked the financial resources to hire counsel to represent him in the District. To the contrary, Mr. Haire obtained and was represented by counsel in the Circuit Court below. Further, the District of Columbia is hardly a remote distance from Mr. Haire's residence in Tampa, Florida. Moreover "modern methods of communication and transportation greatly reduce the significance" of this distance. *Peay*, 205 F.3d at 1213. *See also ESAB*, 126 F.3d at 627 (upholding South Carolina court's exercise of jurisdiction over New Hampshire residents, finding that the inconvenience caused by the distance "is not so extreme as to defeat the exercise of personal jurisdiction pursuant to valid service of process, although it may certainly factor into a transfer decision"); *Brightway Adolescent Hospital*, 139 F. Supp. 2d at 1224 (finding personal jurisdiction proper under the *Peay* test; "Although the distance between Utah and Hawaii is significant, HMAA has not persuaded the court that defending this action in Utah rises to a level of constitutional concern given modern modes of transportation and communication").

In addition, nothing in the record demonstrates that judicial economy or the probable situs of discovery renders the District of Columbia a constitutionally burdensome forum. As the record below demonstrates, this case was summarily resolved and thus discovery was not necessary. Further, judicial economy is well served by keeping all receivership proceedings in the Receivership Court which has overseen and, thus has knowledge, regarding the various transactions through which Mr. Bilzerian transferred his funds, including

the $1 Million Note.[5] Finally, even assuming that Mr. Haire had satisfied his burden of showing a constitutionally significant inconvenience, jurisdiction would still have been properly exercised once the federal interests at stake are taken into account. *See Panama*, 119 F.3d at 948 ("When a defendant makes a showing of constitutionally significant inconvenience, jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant"). In this case, there is a significant federal interest in litigating the dispute in the Receivership Court because of the economies of doing so and, further, to ensure that the federal securities laws are finally vindicated through satisfaction of the judgments entered by the Receivership Court in 1993. *See Federal Fountain*, 165 F.3d at 602 ("We note, too, that the vindication of federal law principles in a federal court would seemingly always be sufficient to carry the day in favor of the exercise of federal jurisdiction, even if we felt obligated to engage in a balancing enterprise, which, in fact, we do not").

II. THERE IS NO SPECIAL NEED FOR THIS COURT'S GUIDANCE ON THE PROPER VENUE OF ANCILLARY ACTIONS.

Mr. Haire's request for this Court's review of the venue of this action is premised on misleading and incorrect characterizations of the ruling below. As alleged in the complaint, this action was brought as an ancillary proceeding to accomplish the objectives of the Receivership Order in the main case by recovering on an asset belonging to the Receivership Estate. The D.C. Circuit found that because

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[5] The final factor is inapposite or insignificant here. *Cf. Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 205 (E.D. Pa. 1974) (finding the exercise of jurisdiction meets the fairness test, while noting the fifth factor "is not important" in the case before it).

venue of the main Receivership proceeding is proper, venue of this ancillary action in the Receivership Court is proper. Pet. App. at 15.

The D.C. Circuit's ruling is consistent with that of the other circuit that has addressed this issue. *See Haile*, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well"). Moreover, treatises have recognized that ancillary claims need not meet venue requirements. *See, e.g.*, Wright & Kane, Federal Practice and Procedure: Federal Practice Deskbook § 10 (2002) ("It was usually held that where ancillary jurisdiction sufficed to allow a claim or a party without independent jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party"); Wright, The Federal Courts 4th § 9 at 32 (1983) (same); Moore's Federal Practice 3d § 110.06 (2004) ("[T]hird-party claims joining new parties [to an existing action] need not meet venue requirements because they are regarded as ancillary to the existing suit").

Notably, Mr. Haire does not identify any circuits that have held to the contrary. His reliance on language from this Court's decision in *Olberding, Doing Business as Vess Transfer v. Illinois Central Railroad*, 346 U.S. 338, 340 (1953), and statements in other cases by the Fifth and Eighth Circuits is misplaced. Each of those cases involved venue of an original, as opposed to an ancillary, action and are, therefore, inapposite. Further, none indicate disapproval of the notion of ancillary venue. Moreover, the Seventh Circuit has noted that the receivership statute authorizes venue of an ancillary action in the appointing court. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (finding that 28 U.S.C. § 754 "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country").

Mr. Haire also seeks review of another issue related to venue that he contends is "fairly included" within the issue discussed above: "[w]hether a valid forum selection clause in a contract automatically becomes unenforceable whenever one of the parties to the contract assigns his rights to a federal receiver." Pet. at 17 n.5. This fundamentally mischaracterizes the D.C. Circuit Court's ruling. The D.C. Circuit Court did not hold that the forum clause in the $1 Million Note should be "disregarded." Rather, the D.C. Circuit Court enforced that forum selection clause, which expressly permits venue in other districts as the law requires. *See* Pet. App. at 16 (reproducing the forum selection provision, which selects courts in Hillsborough County, Florida "unless it shall be lawfully required that venue for any legal proceeding lie elsewhere"). Accordingly, this case does not present an occasion for the Supreme Court to determine whether a forum selection clause is unenforceable in an action brought by a receiver.

Finally, the laying of proper venue in an ancillary case is not worthy of the Supreme Court's review because it is irrelevant to a case brought under the receivership statute. In such a case, a receiver's compliance with 28 U.S.C. § 754 expands the territorial jurisdiction of the receivership court to all districts in which property of the receivership can be found pursuant to 28 U.S.C. § 1692. Because the Receiver complied with 28 U.S.C. § 754 in the Middle District of Florida in this case, the territorial jurisdiction of the D.C. District Court expanded to that District where Mr. Haire could be found for purposes of this action. As a result, the venue statute for federal actions, 28 U.S.C. § 1391 and the forum clause in the $1 Million Note were satisfied.

CONCLUSION

For all of the foregoing reasons, the Court should deny Mr. Haire's petition for certiorari. There is no conflict to be

addressed here or other circumstances warranting this Court's review, only the particular claim of a disappointed litigant who is unhappy with the outcome in his particular case.

Respectfully submitted,

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March 30, 2005

(2)

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No. 04-1012

IN THE

Supreme Court of the United States

ERNEST B. HAIRE, III,
Petitioner,

v.

DEBORAH R. MESHULAM, RECEIVER,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the District of Columbia Circuit

REPLY OF THE PETITIONER

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April 18, 2005

REPLY BRIEF FOR PETITIONER

1. This case involves an appeal of a summary judgment that was granted without a hearing. The petition raises only two questions – one involving personal jurisdiction and the other involving venue. The few facts that are both relevant and necessary with respect to each issue are undisputed and quite simple, which is one of the several reasons why this case is an appropriate vehicle to resolve an important conflict among ten circuit courts.

Rule 14(1)(g) required Petitioner to provide this Court with "a concise statement of the case setting out the facts material to consideration of the questions presented . . . ." Rule 15(2) required Respondent to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Petitioner included only those facts that are material to the questions presented and Respondent did not identify any facts that were misstated. Instead, Respondent spent four pages presenting irrelevant, inaccurate and misleading facts intended to distract the Court from the important questions presented. Petitioner shall use one paragraph of Respondent's facts section as an example to demonstrate that it is inaccurate, irrelevant and improper.

Respondent wrote, "At the time the Receiver served Mr. Haire with the Receivership Order and notified him of his obligation to provide her with access to assets and records of OHLP, the $1 Million Note was due and payable; Mr. Haire owed OHLP $1 million, plus a late fee and other associated amounts." Resp.

Br. at 4.

Mr. Haire and OHLP were not parties to the action involving Bilzerian and the Receivership Order was not directed at either Mr. Haire or OHLP. Contrary to the Receiver's assertion, Mr. Haire did not have an obligation to provide the Receiver with anything because he did not have any of OHLP's assets or books in his possession and, even if he had, he was not required to provide them to the Receiver because she was not appointed as a receiver over OHLP or any of its assets. All the Receiver was entitled to was Bilzerian's equity interest in OHLP, whatever that might have been. Until OHLP was dissolved *and its creditors paid*, the Receiver was not entitled to any of OHLP's assets. However interesting they might be, none of these facts are relevant to the issues presented to the Court.

Respondent continued, "Rather than advise the Receiver of his debt to OHLP as required by the Receivership Order, Mr. Haire acted in secret and in concert with OHLP to alter substantially the $1 Million Note by executing a Forbearance and Extension Agreement 'as of' March 1, 2001." Resp. Br. at 4.

Mr. Haire was under no legal obligation to inform the Receiver of his debt to OHLP. It is false and misleading to state that Mr. Haire acted "in secret" or "in concert" with OHLP. Mr. Haire did nothing to conceal anything from the Receiver or anyone else and he did *not* act in concert with OHLP to do anything improper. Mr. Haire was the borrower and OHLP was

the lender. They were parties with directly adverse interests, which was clearly demonstrated when Mr. Haire sued OHLP and won a multi-million dollar fraud judgment against it for misrepresentations related to this very transaction. Again, none of these facts are relevant to the issues before the Court.

Respondent continued, "Mr. Haire also purported to make an interest payment on the $1 Million Note, but diverted that payment to Bilzerian-nominees, rather than sending it to the Receiver or OHLP." Resp. Br. at 4.

Mr. Haire did not "purport" to make an interest payment. He *did* make an interest payment. Mr. Haire did not "divert" the payment to any nominee. As instructed by OHLP, he sent his payment to OHLP's attorney's trust account. Mr. Haire did not make the interest payment to the Receiver because there was no legal basis for him to do so at that time. As stated earlier, the Receiver was not appointed as a receiver over any of OHLP's assets. The Note was not assigned to the Receiver by OHLP until nine months later [and, when it was assigned, the assignment provided that OHLP is entitled to the first $300,000 received on the Note]. Mr. Haire simply made an interest payment on the Note to the lawful holder of the Note and the *only* party that was lawfully entitled to collect it. Again, none of this is relevant to the issues presented to the Court. The purpose of Respondent's facts section is to portray Mr. Haire in a poor light. In addition to being irrelevant, Respondent's facts section is replete with misrepresentations.

2. Mr. Haire's Petition asks the Court to resolve a conflict among ten circuit courts and determine whether a statute that provides for nationwide service is subject to the "minimum contacts" and "fair play and substantial justice" due process requirements. Eight circuit courts (First, Second, Fifth, Sixth, Seventh, Eighth, Ninth and DC) have held that the "minimum contacts" and "fair play and substantial justice" due process requirements do *not* apply, while two circuits (Tenth and Eleventh) have held that they do. One circuit court (Third) has assumed they do but has not decided the issue. However, two of the circuits (Fifth and Sixth) that decided the issue were divided by strenuous dissents. In the case of the Fifth Circuit, a subsequent panel unanimously held that it was in agreement with the dissent and, although it was bound by precedent to follow a prior panel's decision, "we do so with grave misgivings regarding the authority upon which we rely." Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 826 (5th Cir.1996).

Several courts have noted the conflict among the circuits and that this Court has yet to resolve that conflict. See NGS American v.Jefferson, 218 F.3d 519, 524 fn.5 (6th Cir.2000) ("The Supreme Court has never squarely decided whether the Fifth Amendment due process is satisfied merely by national contact under a nationwide service of process provision."); Medical Mutual of Ohio v. deSoto, 245 F.3d 561, 568 fn.4 (6th Cir.2001) ("Our conclusion is not universally adopted among the circuits. . . . The Tenth and Eleventh Circuits . . . have recently rejected this view"); Sheet Metal Workers' National Pension Fund v. Elite, 212

F.3d 1031, 1036 (7th Cir.2000) ("the tenth circuit has concluded that the defendant must have adequate contacts with the federal district in which the litigation will occur, and not just with the United States as a whole").

Respondent argues that this Court should decline to resolve the circuit conflict because the *ten* "circuit split concerning the appropriate due process analysis in *not well developed*"! Resp. Br. at 9 (emphasis added). Respondent failed to indicate just how much more this issue must be developed before it would be suitable for resolution by this Court.

This Court has explained, the Due Process Clause exists, in part, to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Until this Court resolves the issues raised by the petition, citizens will not be able to predict where they might be haled into court. How could Mr. Haire have predicted that he would be dragged into court in the District of Columbia, 1,000 miles from home, solely because the holder of a note assigned 70% of its interest in the note to a receiver?

3. Respondent also argued that, even if this Court decided the issue in Mr. Haire's favor, it would not matter because Mr. Haire did not "proffer any evidence that would satisfy [his] burden" to prove that the exercise of personal jurisdiction over him would

offend the traditional notions of "fair play and substantial justice." Resp. Br. at 12.

Respondent's argument is fundamentally flawed. Mr. Haire did not have the burden to prove personal jurisdiction, Respondent did. The party seeking to establish a court's *in personam* jurisdiction has the burden of proof. Epps v. Stewart Information Services Corp., 327 F.3d 642, 647 (8th Cir.2003); FDIC v. Oaklawn Apartments, 959 F.2d 170, 174 (9th Cir.1992). That is especially true in a case like this one, where the district court did not conduct a hearing on Mr. Haire's motion to dismiss. "Where a district court does not conduct an evidentiary hearing on the question [of personal jurisdiction], the burden is on the Plaintiff to establish a prima facie case of personal jurisdiction over a nonresident defendant." Consolidated Development Corporation v. Sherritt, Inc., 216 F.2d 1286, 1291 (11th Cir.2000). Respondent relied exclusively on her claim that nationwide service automatically establishes personal jurisdiction, and did not present any other facts to satisfy her burden to prove personal jurisdiction.

In this case, the district court not only failed to conduct a hearing on Mr. Haire's motion to dismiss for lack of personal jurisdiction, it failed to conduct a hearing on Respondent's motion for summary judgment, where Respondent also had the burden to prove personal jurisdiction. FDIC v. Oaklawn Apartments, 959 F.2d at 174. For purposes of summary judgment, the undisputed facts in this case

on the issue of personal jurisdiction are as follows:

> 1. The complaint does not contain any allegations with respect to personal jurisdiction;
> 2. Mr. Haire has not had *any* contacts with the District of Columbia for more than two decades;
> 3. The Note and Pledge Agreement were signed in Tampa, Florida;
> 4. The collateral securing the Note was delivered to OHLP in Tampa, Florida; and
> 5. The Note contains a forum selection clause that provides for venue in Tampa, Florida.

In addition, this is a breach of contract case where the contract specified venue in Tampa, Florida and where the defendant resides. Respondent, who was assigned her 70% interest in the contract by the party that defrauded Mr. Haire, has the capacity to bring the action in Tampa, Florida, where personal jurisdiction is undisputed, where the Note and Pledge Agreement were signed, where all the witnesses are located, where venue is required by the Note's forum-selection clause, where Mr. Haire is suing the assignor for fraud, and *where Respondent and her attorneys have an office.* In view of these facts, invoking personal jurisdiction over Mr. Haire would likely offend the traditional notions of "fair play and substantial justice." Contrary to Respondent's claim, if this Court were to render a decision favorable to Mr. Haire, it is *not* a certainty that "the outcome here would be the same." Resp. Br. at 12.

CONCLUSION

For the reasons set forth above and in petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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